SUPREME COURT, U. S.
No. 73-343
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH M. DONLON AND CATHERINE DONLON,
PETITIONERS

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
BENNET N. HOLLANDER,
RICHARD FARBER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINIONS BELOW

The memorandum opinion of the district court (Pet. App. 19-25) is reported at 345 F. Supp. 591. The opinion of the court of appeals (Pet. App. 26-27) is reported at 479 F. 2d 317.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26) was entered on May 30, 1973. The petition for a writ of certiorari was filed on August 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service records sought by petitioners under the Freedom of Information Act are investigatory files compiled for law enforcement purposes, and therefore exempt from disclosure.

STATUTE INVOLVED

The Freedom of Information Act is set forth at Pet. App. 11-14.

STATEMENT

In February 1965, petitioners filed a petition in the United States Tax Court for a redetermination of income tax deficiencies and civil fraud penalties assessed by the Commissioner.[1] In October 1970, petitioners requested, in a letter to the Internal Revenue Service, all reports, communications, memoranda and other writings upon which the Commissioner relied in determining the deficiencies against petitioners. In addition, petitioners sought all interdepartmental, inter-agency and intra-agency communications which concerned their tax liabilities (Pet. App. 15-16, 20). The request was denied on the grounds that the records sought were exempt from disclosure under subsections (b)(5) and (7) of the Freedom of Information Act, 5 U.S.C. 552.

Petitioners then instituted the present case in the district court to compel disclosure of the requested information. The district court granted summary judgment for the government, holding that the records sought by petitioners were investigatory files compiled for law enforcement purposes and therefore exempt under subsection (b)(7) of the Act (Pet. App. 22-25). The court of appeals affirmed *per curiam* (Pet. App. 26-27).

ARGUMENT

1. Under subsection (b)(7) of the Freedom of Information Act, investigatory files compiled for law enforcement purposes are exempt from disclosure except to the

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[1] Petitioners' suit is still pending in the Tax Court.

extent available by law to a party other than an agency. The courts below held that this exemption applies to investigatory files compiled for civil as well as criminal law enforcement, rejecting petitioners' contention that the exemption covers only investigatory files relating to the enforcement of criminal laws. This holding is correct and is in accord with the legislative history of the Act and with other decisions. See H. Rep. No. 1497, 89th Cong., 2d Sess., p. 11; *Soucie* v. *David*, 448 F. 2d 1067, 1078, n. 45 (C.A.D.C.); *National Labor Relations Board* v. *Clement Brothers Co.*, 407 F. 2d 1027, 1031 (C.A. 5); *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726, 727 (N.D. Calif.).

Petitioners assert (Pet. 5-7) that the decision of the court of appeals below on this point is in conflict with the decision of the District of Columbia Circuit in *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, certiorari denied, 400 U.S. 824. There is no conflict. The court in *Bristol-Myers* did not decide that the exemption for investigatory files is limited to criminal investigations; to the contrary, it distinguished between investigations anticipating enforcement proceedings, civil or criminal, and more general investigations made in connection with rule making proceedings, and held only that the latter were subject to disclosure. Moreover, in *Soucie* v. *David*, *supra*, the District of Columbia Circuit explicitly stated that the subsection (b)(7) exemption covers files prepared for civil enforcement purposes.[2]

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[2] Petitioners' reliance (Pet. 6-7) on *Hawkes* v. *Internal Revenue Service*, 467 F. 2d 787 (C.A. 6), is also misplaced. That case did not involve the subsection (b)(7) exemption for investigatory files at issue here. The question there was whether the portions of the Internal Revenue Service Manual sought by the taxpayer

The Internal Revenue Service files sought by petitioners here relate to a specific investigation of their tax liability; that investigation was undertaken for the joint purpose of civil and criminal enforcement of the tax laws (see Pet. 3) and therefore this case does not even raise the clear question of whether purely civil enforcement files are subject to disclosure. The files here would be covered by subsection (b)(7) of the Act even if purely civil enforcement files were not. Cf. *Donaldson* v. *United States*, 400 U.S. 517.

2. Petitioners also contend (Pet. 7-9) that the court below erred in refusing to look to the discovery provisions of the Federal Rules of Civil Procedure in considering whether the investigatory files sought by petitioners were "available by law" to them for purposes of subsection (b)(7). But the legislative history pertaining to this exemption makes it clear that Congress did not intend the Act to be used by a party involved in litigation with an agency in order to obtain greater or earlier access to investigatory files than such party would be able to obtain through discovery in the litigation. H. Rep. No. 1497, *supra*, p. 11; see *Bristol-Myers Co.* v. *Federal Trade Commission*, *supra*, 424 F. 2d at 939. The investigatory files sought by petitioners related to proceedings pending in the Tax Court to which the discovery procedures of the Federal Rules of Civil Procedure are inapplicable. There was therefore no basis for referring to those Rules in this case.

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were administrative in nature and therefore subject to disclosure under subsection (a)(2)(C) of the Act, which provides that "administrative staff manuals and instructions to staff that affect a member of the public" shall be made available for public inspection and copying.

Moreover, even assuming *arguendo* that the Federal Rules of Civil Procedure were applicable, petitioners would still not have been entitled to disclosure of the files. These files, consisting in part of work papers, computations and internal memoranda, communications and opinions, all relating to petitioners' case, represent attorneys' work product and therefore would have been exempt from discovery under the Rules. See *Hickman* v. *Taylor*, 329 U.S. 495.[3]

3. The court of appeals was also correct in refusing to make a collateral determination whether petitioners would be able to discover the investigatory files at issue in the Tax Court. There was no reason for the court to decide that question, since petitioners may obtain a direct ruling from the Tax Court. Contrary to petitioners' contention (Pet. 9-10), the court's ruling does not conflict with the decisions of the District of Columbia Circuit in *Soucie* v. *David*, *supra*, and *Getman* v. *National Labor Relations Board*, 450 F. 2d 670. Those cases hold merely that a court does not have equitable discretion to refuse disclosure of information that does not fall within any of the specific exemptions of the Act. In the instant case, however, the court simply refused to determine whether information exempt

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[3] Contrary to petitioners' assertion (Pet. 7-8), this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, provides no basis for review of the decision of the court below. That case did not involve exemption (b)(7) but the different considerations pertaining to the subsection (b)(5) exemption for inter-agency or intra-agency memoranda or letters. *Consumers Union of U.S., Inc.* v. *Veterans Administration*, 301 F. Supp. 796 (S.D. N.Y.), appeal dismissed, 436 F. 2d 1363 (C.A. 2), and *General Services Administration* v. *Benson*, 415 F. 2d 878 (C.A. 9), relied on by petitioners (Pet. 8), are also inapposite since neither involved an attempt to obtain disclosure of investigatory files.

under the Act was subject to discovery under the rules and practices of the Tax Court. We are aware of no decision in conflict with this holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
BENNET N. HOLLANDER,
RICHARD FARBER,
Attorneys.

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